

EXAMPLE LETTER OF ASSET PURCHASE AGREEMENT (APA) UNDER DUTCH LAW

This is an example of a model, or: template, for an Asset and Liabilities Purchase Agreement (APA) under the laws of the Netherlands. If you are looking for examples of other Dutch law standard agreements, please visit the website of Amsterdam law firm Penrose (www.penrose.law/en/templates).

This template for a purchase agreement considers the situation of a sale of assets and liabilities of a Dutch private limited company (B.V.). In this example, the purchase price for the assets does not include stipulations regarding working capital. Here, the purchaser needs to arrange for the financing of the acquisition of the assets as well as the working capital. We advise to seek professional assistance with regards to the determination of the purchase price as well as the Dutch tax consequences. More legal information about company acquisitions, especially share purchase transactions, in the Netherlands can be found on the Penrose website: <https://penrose.law/en/corporate-law/>.

In this Dutch law template asset purchase agreement, there is one buyer and one seller. The structure of this asset/liability agreement is based on the situation that the business is sold and delivered on the date of signing the agreement. The design of this asset/liability agreement is further such that the buyer only acquires the assets and liabilities that are explicitly mentioned as part of the agreement, without any shares, securities or real estate being transferred. Assets (including receivables) and liabilities (including payables) that are not mentioned in the purchase agreement or the annexes remain with (and are at the risk of) the seller.

Other common variations on the principles included as examples in this asset/liability agreement are as follows:

- (a) an asset/liability transfer in combination with a share transfer, where the business to be transferred is also the holder of shares in a legal entity;
- (b) a transfer of assets/liabilities that is subject to special conditions, for example, the transfer of real estate;
- (c) a transfer of the business including Dutch or foreign bank accounts and possibly with an effective date in the past;
- (d) an agreement solely for the sale of assets, such as stock, inventory and goodwill) whereby all debts (liabilities) remain with the seller, e.g., in the case of a trustee of a bankrupt estate; and/or
- (e) e. a transfer of the business with the intention of also transferring the assets/liabilities that are not explicitly mentioned in the agreement.

The components that must be checked and supplemented in this template are indicated with yellow highlighting.

Additionally, we would like to point out that in the case of a business transfer, specific labor law and competition law aspects may play a role depending on the situation, which fall outside the scope of this template acquisition agreement.

Furthermore, we would like to emphasize that the transfer of a business through an asset/liability transaction has tax consequences. The specific tax implications also depend on the type of asset being transferred and will differ significantly from the tax considerations involved in a transfer of a business through a share transfer. In this context, it is highly advisable to timely seek tax advice and to have the involved tax advisor provide guidance on the tax arrangements and provisions to be included in the acquisition agreement.

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Penrose is a law firm in Amsterdam, the Netherlands, specializing in Dutch company law, M&A (mergers and acquisitions), labor law, and IT and intellectual property law. You can reach Penrose at info@penrose.law or at +31 20 2400710.

AGREEMENT UNDER DUTCH LAW FOR THE PURCHASE OF ASSETS AND LIABILITIES

THE UNDERSIGNED:

- I. [NAME OF BUYER], a private limited liability company, having its statutory seat at [●] and its office address at [●], registered with the Chamber of Commerce under number [●], duly represented herein by [●] (hereinafter referred to as the "Buyer");
- II. [NAME OF SELLER], a private limited liability company, having its statutory seat at [●] and its office address at [●], registered with the Chamber of Commerce under number [●], duly represented herein by [●] (hereinafter referred to as the "Seller");

Parties I. and II. are collectively referred to as the "Parties" and individually as a "Party";

RECITALS:

- A. The Seller operates a business in the field of [●] (the "Enterprise");
- B. The Parties have entered into discussions regarding the transfer of the Enterprise from Seller to Buyer through the sale and delivery of certain assets and the assumption of certain liabilities (the "Transaction");
- C. The Parties have now reached an agreement regarding the Transaction under the terms set forth in this Agreement;

DETERMINE AS FOLLOWS:

Clause 1. Definitions and Interpretation

1.1 The terms in this Agreement that are capitalized have the following meanings:

Agreement	means this agreement, including recitals and any and all Annexes;
Annex	means an annex as attached to this Agreement;

Assets	means the assets included in Clause 2.3;
Building	means the office building where the Enterprise is located at the time of entering into this Agreement, situated at [address];
Buyer	means [NAME OF BUYER];
Clause	means a clause in this Agreement;
Customers	All customers to whom Seller has provided and is providing services and/or products during the period [of 24 months prior to and] up to Delivery Date, including those listed in Annex [●];
Customer Administration	means all Customer Agreements, the available contact details and the billing history of the Customers;
Customer Agreements	the agreements between Seller and the Customers with regard to the provision of services and/or products;
Debts	means the debts in connection to the Enterprise not included in the working capital, as well as similar items including but not limited to [●] and [●];
Delivery	means the actions that will take place on the Transaction Date to ensure delivery of the Assets and assumption of the Liabilities;
Delivery Date	means [INSERT DATE], or another date mutually agreed upon in writing between the Parties on which Delivery will take place;
Disclosed Information	means the information as included in the overview of Annex [●], in which Seller has also described all Infringements known to Seller at the time of Delivery, specifying the expected damages resulting from the Infringement;
Employees	means the employees listed in Annex [●];
Employee Obligations	means the outstanding obligations in connection with the Enterprise towards the Employees as of the Delivery Date;

Employee Obligations Overview	means the overview included as Annex [●] in which the Employee Obligations are listed, including accrued vacation pay and outstanding, unused, and unpaid vacation and leave days;
Employment Agreements	means the employment agreements between the Seller and the Employees;
Enterprise	means the enterprise as described in Recital A;
Guarantees	has the meaning as described in Clause [5.3];
Infringement	has the meaning as described in Clause [5.4];
IP Rights	means the intellectual property rights as [described in Clause 2.3 sub h/specified in Annex [●]];
Legal relationships	has the meaning as described in Clause [2.6];
Liabilities	has the meaning as described in Clause [2.4];
Liquid Assets	means the funds in the bank accounts of the Enterprise on the Effective Date;
Parties	means Buyer and Seller;
Purchase Price	means the purchase price for the Enterprise, Assets, Liabilities, and Legal Relationships, as referred to in Clause 3.
Rental Agreement	means the rental agreement relating to the Building;
Reference Working Capital	means the working capital to be mutually agreed upon as per the Effective Date;
Security	means the security as described in Clause 3.1.6.
Seller	means [NAME OF SELLER];
Supplier Agreements	the agreements specified in Annex [●] with respect to the Enterprise's suppliers, service providers and licensors;

Transaction	means the Transaction as described in Recital B;
Transaction Date	means the day on which Delivery takes place.
Ultimate Shareholder	means Mr / Ms [name UBO of Seller];
Work In Progress	means the work in progress arising from the Legal Relationships as of the Delivery Date, consisting of the assets and liabilities as mentioned in the Work in Progress Overview;
Work In Progress Overview	means the overview included as Annex [●] which shows the following Assets and Liabilities: <u>assets</u> : all amounts for services and products to be invoiced on or after the Delivery Date that have been performed by the Seller prior to the Delivery Date; and <u>liabilities</u> : all work to be performed for the Customers that has been invoiced by the Seller prior to the Delivery Date, but which will only be performed on or after the Delivery Date;
Working Day	means a day on which banks are open in the Netherlands.

1.2 Headings to Clauses and Annexes are for convenience only and do not affect the interpretation of this Agreement.

1.3 In this Agreement:

- a. references to recitals, Clauses and Annexes are references to recitals, clauses and annexes of this Agreement, unless otherwise expressly indicated;
- b. words indicating the singular shall include the plural and vice versa;
- c. references to 'best known of Seller', 'to the best of Seller's knowledge' or any similar expression shall be deemed to refer to the knowledge of persons employed by Seller as well as the Ultimate Shareholder, or the knowledge they should reasonably have;
- d. words such as "including", "including", "including" or "including" shall be used to indicate that the list to which they refer is not exhaustive;
- e. reference to a date that is not a Working Day shall be construed as a reference to the next Working Day, on the understanding that the General Time Limits Act shall be followed for the calculation of periods.

Clause 2. Purchase and Purchase Price

- 2.1 The Seller hereby sells to the Buyer and the Buyer hereby buys from the Seller the Enterprise, consisting of the Assets (further described in Section 2.3) and the Liabilities (further described in Section 2.4).
- 2.2 Upon Delivery, the Assets and Liabilities shall be deemed to be for the account and risk of the Buyer as per the Delivery Date.
- 2.3 The Assets consist of the following goods and rights:
- a. all business assets, such as computers, printers, servers, IT/software systems, company cars, and office supplies, including at least those specified in Annex [●];
 - b. the complete furnishings and inventory located in, at, or on the Building, including at least those specified in Annex [●];
 - c. the other goods owned by the Seller that are necessary or utilized by the Seller in the context of the Enterprise, including at least those goods specified in Annex [●];
 - d. the assets listed in the Work In Progress Overview;
 - e. the Customer Administration;
 - f. the goodwill, know-how and customer relationship management (CRM) data regarding the Enterprise;
 - g. the trade names, domain names, trademarks, models, copyrights, inventions, designs, logo's and any other intellectual property rights used in the context of the Enterprise (the "IP Rights"), including at least the IP Rights specified in Annex [●]; and
 - h. all claims against third parties specified in Annex [●].
- 2.4 The Liabilities consist solely of the following obligations:
- a. the liabilities listed in the Work in Progress overview;
 - b. the Employee Obligations; and
 - c. the obligations further specified in Annex [●].

The Buyer does not assume any obligations towards a third party from the Seller other than the aforementioned Liabilities.

- 2.5 The rights and obligations of the Seller under the Employment Agreements shall automatically transfer to the Buyer upon completion of the Delivery. The Seller declares that (i) on the Delivery Date, no employees other than the Employees will be employed by the Buyer as a result of this Transaction, and that (ii) there are no other obligations towards the Employees than those set forth in the Employee Obligations Overview.

- 2.6 At the moment of Delivery, the Buyer shall acquire from the Seller the Customer Agreements, the Supplier Agreements, and the Rental Agreement (the "**Legal Relationships**"). The Seller declares that as of the Delivery Date, the Seller has no other obligations arising from the Legal Relationships.
- 2.7 To the extent that the Ultimate Shareholder owns goods that are utilized by the Seller in the context of the Enterprise, these goods shall be transferred from the Ultimate Shareholder to the Seller prior to Delivery, and upon Delivery, from the Seller to the Buyer.

Clause 3. Purchase Price and Delivery

- 3.1 The purchase price for the Assets and Liabilities amounts to EUR [●],- (in words: [●] euros) (the "**Purchase Price**").
- 3.2 The Delivery takes place under the condition precedent of payment of the Purchase Price by transferring it from Buyer to Seller's bank account with IBAN [●], without the right to deduction, discount, or set-off.
- 3.3 Upon the moment of payment of the Purchase Price in accordance with Clause 3.2, the Delivery takes place and it is stipulated that:
- a. the movable goods referred to in Clause 2.3 (a) to (h), insofar as they are not held by a third party, are delivered to the Buyer by means of the Buyer taking possession of such goods;
 - b. the movable goods referred to in Clause 2.3 (a) to (h) that are held by a third party are delivered to the Buyer by the Seller by notifying the relevant third party, also on behalf of the Buyer, that they will henceforth hold the goods for and to the benefit of the Buyer;
 - c. the other Assets, which can only be delivered by means of a deed to that effect, are delivered by the signing of this Agreement;
 - d. the Legal Relationships are taken over by the Buyer from the Seller by means of the signing of this Agreement by way of contract transfer as referred to in Article 6:159 of the Dutch Civil Code;
 - e. the Liabilities are taken over by the Buyer from the Seller by way of debt assumption as referred to in Article 6:155 of the Dutch Civil Code, to the extent that they have not already been taken over by way of contract transfer as referred to in Article 6:159 of the Dutch Civil Code;
 - f. if and to the extent the Employment Agreements do not transfer to the Buyer by operation of law pursuant to the rules for a transfer of undertaking, then the relevant Employment Agreements are assumed by the Buyer and released by the Seller by way of contract transfer as referred to in Article 6:159 of the Dutch Civil Code.
- 3.4 The Seller shall provide the Buyer with all cooperation necessary for the Buyer to effect and execute this Agreement and the Delivery, including transferring the company vehicles into the Buyer's name and registering and enforcing the Intellectual Property Rights against third parties. The Seller hereby

grants the Buyer an irrevocable power of attorney to perform the relevant actions on behalf of the Seller. At the Buyer's request, the Seller shall cooperate in providing a separate written power of attorney to facilitate the Delivery and the aforementioned in this Clause.

- 3.5 Immediately after Delivery, the Seller shall transfer all administrative documents (including applicable agreements, ownership papers, and warranty certificates) related to the Assets, Liabilities, and Legal Relationships to the Buyer or make copies thereof available to the Buyer (in which case the Seller shall retain the original versions, also for the benefit of the Buyer).
- 3.6 If the Buyer determines that, after Delivery, certain Assets, which are required to operate the Enterprise in the same manner as prior to Delivery, or administrative documents as referred to in Clause 3.5, have not been transferred by the Seller to the Buyer at or prior to Delivery, the Seller shall take all necessary actions to ensure that those Assets or administrative documents are transferred to the Buyer, or, if that is not possible, that an exclusive, unlimited, and unconditional right of use regarding those Assets is established in favor of the Buyer without the Buyer being obligated to pay any compensation.
- 3.7 The Seller shall provide the Buyer with the cooperation necessary for the Buyer to collect the claims arising from the Work in Progress.
- 3.8 If and to the extent that, at the time of Delivery, the creditors or the counter-parties of the Legal Relationships have not granted consent or cooperation to the assignment of the contract or the assumption of debt, the Buyer is hereby irrevocably authorized by the Seller to request, on behalf of the Seller, such parties to grant consent or cooperation to the assignment of the contract or the assumption of debt. If and to the extent that no cooperation is granted for the assignment of the contract or no consent is given for the assumption of debt, the relevant debt or contract shall be deemed to have been assumed by the Buyer in the mutual relationship between the Buyer and the Seller. The Seller shall, at the first request, transfer the rights from the Legal Relationships to the Buyer and shall have the Buyer fulfill the Seller's obligations arising from these Legal Relationships in the name of the Seller but at the Buyer's own expense, whereby the rights and obligations from these Legal Relationships shall be for the account and risk of the Buyer as if the transfer had indeed taken place. The Seller hereby grants the Buyer an irrevocable power of attorney for as long as the rights from a Legal Relationship have not been transferred to the Buyer, to exercise those rights in the name of the Seller but at the Buyer's own expense.

Clause 4. Tax

- 4.1 Each Party shall bear its own tax liabilities imposed or incurred as a result of the sale and transfer to the Buyer of the Enterprise, Assets and/or Liabilities.

- 4.2 All taxes and social security contributions related to the Enterprise, Assets and Liabilities concerning the period up to the Delivery Date shall be borne by the Seller and for the period thereafter, by the Buyer. Payments that are not the responsibility of the paying Party must be reimbursed by the other Party.

Clause 5. Indemnifications and Guarantees

- 5.1 The Seller indemnifies the Buyer and holds the Buyer harmless against claims or proceedings brought against the Buyer and for damages, costs, and losses that the Buyer may suffer or incur as a result of or in connection with:
- a) claims, damages, costs, and taxes related to or arising from obligations with other employees and/or former employees of the Seller who are not the Employees;
 - b) claims, damages, costs, and taxes related to or arising from obligations with Employees concerning the period prior to the Delivery Date, excluding the Employee Obligations;
 - c) claims, damages, costs, and taxes related to or arising from one or more Legal Relationships to the extent that they arose before the Delivery Date, excluding the Work in Progress.
- 5.2 The Buyer shall promptly fulfill the obligations arising from the Liabilities and indemnify the Seller against all claims for performance from one or more creditors or other entitled parties regarding those obligations.
- 5.3 The Seller warrants to the Buyer that the following guarantees (the "**Warranties**") are accurate, complete, and not misleading as of the Delivery Date:
- a) The Seller is duly incorporated. The Seller and the Enterprise are registered under number [●] in the trade register of the Chamber of Commerce. The information regarding the Seller and the Enterprise as recorded by the Chamber of Commerce in the trade register is accurate and complete;
 - b) The Seller is authorized to enter into this Agreement;
 - c) This Agreement has been validly signed by the Seller and it constitutes valid and enforceable obligations of the Seller. The execution and fulfillment of this Agreement and the Delivery do not result in a violation or breach of any legal provision, regulation, decision, judgment, permit, exemption, or waiver, or the articles of association of the Seller, and do not constitute a default in the performance of any obligation of the Seller;
 - d) No consent or exemption from any governmental authority, industry organization, or any other third party is required for the execution and fulfillment of this Agreement and the Delivery;
 - e) The Seller is the full legal and economic owner of the Assets. The Assets are not encumbered by any business rights and are free from attachments, and third parties cannot assert or exercise any rights regarding the Assets, except for the Buyer under this Agreement;

- f) The Assets comprise all assets necessary and used in or for the operation of the Enterprise. No other assets than the Assets are required to continue the Enterprise as a going concern in the manner as before the Delivery;
- g) The Assets are free from visible or hidden defects and are in good condition;
- h) Any claim included in the Work in Progress overview is valid and will be collectible in the ordinary course of business;
- i) The IP Rights encompass all registered and unregistered rights to trade names, trademarks, designs, copyrights, and any other intellectual property rights and applications thereof worldwide, to which the Seller is entitled and which are used within the Enterprise. No other proprietary intellectual property rights are used or needed for the continuation and operation of the Enterprise;
- j) The Seller is solely entitled party to the IP Rights and has taken all necessary measures to protect the IP Rights;
- k) The IP Rights are valid and enforceable and do not infringe upon the rights of third parties, and none of the IP Rights are being infringed upon by others or by other rights, and none of the IP Rights are encumbered by a license or permit in favor of a third party;
- l) None of the IP Rights will wholly or partially expire or become invalid as a result of or in connection with the execution or performance of this Agreement or the Delivery;
- m) The Buyer does not need to assume any agreements other than the Legal Relationships for the continuation of the Enterprise in its form on the Delivery Date. All Legal Relationships have been entered into in the normal course of business of the Enterprise and at arm's length;
- n) The Seller has not received any notice or communication of the complete or partial termination or modification of any Legal Relationship. The Legal Relationships are in effect and valid and contain rights and obligations that bind the counterparty and such rights are legally enforceable against that counterparty;
- o) There are no labor disputes between the Seller on the one side and one or more Employees, or employees or former employees of the Seller other than the Employees, on the other side;
- p) There are no claims from third parties regarding the Assets and the Legal Relationships, nor have potential claims regarding the Assets and the Legal Relationships been announced by third parties; and
- q) There are no known facts or circumstances that could lead to legal proceedings regarding the Assets, Liabilities and/or the Legal Relationships.

5.4 If one or more of the Warranties are incorrect, incomplete, or misleading (a "**Breach**"), the Seller shall be liable to the Buyer for all damages suffered by the Buyer as a result of the Breach, unless the Buyer was already aware of the Breach due to the Disclosed Information. The following also applies:

- a) the total liability of the Seller for damages resulting from one or more Breaches is limited to an amount equal to [●]% of the Purchase Price;
- b) the Seller is not liable for damages resulting from a Breach as long as the total damages are less than EUR [●]; however, if the damages exceed that amount, the Seller shall be liable for the entire amount of damages;
- c) the liability of the Seller for damages resulting from one or more Breaches shall expire if the Breach is not communicated to the Seller no later than [●] years after the Delivery Date;
- d) the Buyer must notify the Seller of a Breach within 30 days after the Buyer becomes aware of the Breach, stating the expected consequences of the Breach. Late notification of the Breach does not result in the expiration of rights, but any damages arising from the late notification shall not be borne by the Seller.

5.5 The Buyer and Seller mutually confirm that at the time of signing this Agreement, they are not aware of any Breach, other than the Breaches described in the Disclosed Information.

Clause 6. Non-compete

- 6.1 Unless written consent is obtained from the Buyer, the Seller and/or the Ultimate Shareholder shall, for a period of [two] years from the Delivery Date, directly or indirectly, for themselves or for others, in any form or capacity:
- a) not engage in any activities, nor be involved in or have an interest in any activities that compete with or are similar to the activities of the Enterprise;
 - b) not conduct any commercial or professional activities with, or seek to approach, any person or entity that is or has been a client, contractor, customer, or supplier of the Enterprise;
 - c) not induce any client, contractor, customer, supplier, or any other person or entity with whom the Buyer has a contract to terminate or modify the commitment or relationship with the Buyer; and/or
 - d) not recruit, hire, or otherwise enter into a contract with any person employed by the Buyer, in any capacity, and/or attempt to induce such a person to modify or terminate the commitment or relationship with the Buyer.
- 6.2 In the event of a breach of any obligation set forth in Clause 6.1 by the Seller or the Ultimate Shareholder, the Seller or the Ultimate Shareholder shall immediately owe the Buyer a penalty in the amount of EUR [50,000] (in words: [fifty thousand] euros) for each breach, plus EUR [5,000] (in words: [five thousand] euros) for each day that the breach continues, without the Buyer being required to prove any loss or damage, and without prejudice to the Buyer's right to claim full compensation for damages in addition to this penalty.

Clause 7. Confidentiality

- 7.1 The Parties shall not disclose or otherwise make public any confidential information to third parties in any form without prior written consent from the other Party. Confidential information shall include, but is not limited to, information relating to each other, the Enterprise, the Transaction and this Agreement. Furthermore, Buyer ensures that it will not provide or disclose the Due Diligence Information to third parties, other than for the purpose of conducting Due Diligence and after the receiving party has committed to strict confidentiality towards Buyer and Seller. Buyer shall immediately destroy all Due Diligence Information in its possession as soon as this Agreement terminates for reasons other than the signing of the Agreement.
- 7.2 Any existing confidentiality agreement regarding the Transaction remains in effect until the Transaction Date.

Clause 8. Notifications, Announcement

- 8.1 All notifications under this Agreement shall be recorded in writing and sent to the addresses specified in the preamble of this Agreement, with a copy sent by email to the email addresses listed below, unless one of the Parties has provided a written change of address to the other Party:
- if to Seller: [●];
 - if to Buyer: [●].
- 8.2 Buyer and Seller shall issue a joint press release regarding the Transaction on the Delivery Date. A Party shall not make any other public announcements about or in connection with the Transaction without the consent of the other Party.

Clause 9. Miscellaneous

- 9.1 This Agreement constitutes the entire Agreement between the Parties regarding the Transaction. This Agreement supersedes all prior oral or written communications, correspondence, contracts and agreements between the Parties concerning the Transaction.
- 9.2 The Parties are not entitled to assign any rights and/or obligations arising from this Agreement to any third party without the prior consent of the other Party.
- 9.3 If any provision is found to be invalid, the remaining provisions shall remain in full force and effect. In that case, the Parties shall replace the invalid provision with a valid provision that corresponds to the purpose and intent of the Agreement, ensuring that the new provision differs as little as possible from the invalid provision.

- 9.4 The Parties irrevocably waive the right to demand the complete or partial dissolution, annulment, or modification of this Agreement after Delivery has taken place.
- 9.5 Each Party shall bear its own costs arising from or related to the establishment and execution of the Agreement, unless expressly stated otherwise in the Agreement.

Clause 10. Applicable law, Jurisdiction

- 10.1 The Parties agree that the United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.
- 10.2 The Agreement shall be governed exclusively by Dutch law.
- 10.3 The interpretation, validity, and/or performance of the Agreement shall be submitted exclusively to the competent court in [Amsterdam] for resolution.

SIGNED ON [DATE] BY:

[Name Seller]

[Name Buyer]

[Name representative]

Function: [●]

[Name representative]

Function: [●]